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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 359

ALLEGHANY CORPORATION, *et al.*,
Petitioners,

v.

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS ALLEGHANY CORPORATION, ET AL., AND FOR PETITIONERS ROSE SLAYTON, ET AL.

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November 22, 1966

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Opinions Below

The opinion of the Court of Appeals for the Eighth Circuit (R. 135-58) dated and filed April 19, 1966, is reported *sub nom. Mississippi River Fuel Corp.* v. *Slayton*, 359 F. 2d 106. The memorandum opinion of the District Court for the Eastern District of Missouri (R. 90-98) dated July 13, 1964, order entered September 18, 1964 (R. 99), is reported *sub nom. Slayton* v. *Missouri Pac. R.R.*, 233 F. Supp. 747.

Jurisdiction

The judgment of the Court of Appeals herein was entered on April 19, 1966 (R. 159). The petition for a writ of certiorari was filed July 18, 1966 and was granted October 10, 1966 (R. 161). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court is based on diversity of citizenship* (R. 1-2, 23).

Statutes Involved

The relevant statutes are reproduced in Appendix A, as follows:

Section 5(11) of the Interstate Commerce Act, 54 Stat. 898, 908-09 (1940), 49 U.S.C.A. §5(11) (1959).

The statement entitled "National Transportation Policy," 54 Stat. 898, 899, 49 U.S.C.A. preceding §1(1959).

Missouri General and Business Corporations Law, R.S. Mo. (1959), 17A Mo. Stats. Anno. §§351.270, 351.420, 351.425 and 351.690 (Vernon's 1966).

Questions Presented

1. In determining what stockholder vote is required to approve a proposed consolidation of carriers, should §5(11) of the Interstate Commerce Act be interpreted as establishing a majority aggregate vote as the "primary standard," and as providing that a different vote under "applicable State law" must be treated as an "exception," to be applied only if the State law is free from doubt?

2. Did the Court of Appeals err in declining to determine and apply so much of the applicable State law as

* Plaintiffs are citizens of Maryland and New York. Defendants are citizens of Missouri and Delaware.

it considered not "clearcut, free-from-doubt and positive" concerning the stockholder vote required to approve a railroad consolidation?

3. Are the provisions of MoPac's charter fixing the respective rights of the Class A and Class B stockholders of MoPac to vote as separate classes and of the Missouri statute with respect to the stockholder vote required for adoption of a merger or consolidation of carriers, to be construed according to federal law* rather than the law of Missouri?

4. Did the Court of Appeals err in disregarding the Interstate Commerce Commission's consistent construction of §5(11) of the Interstate Commerce Act as requiring the stockholder vote called for by corporate charter provisions authorized under the law of the State of incorporation of the railroad?

Statement

These cases arose below on defendants' motions to dismiss the complaints (R. 17, 19, 37, 40). It follows that the allegations of fact in the complaints must be taken to be true and not in issue (R. 91-92).

Summary Statement of the Controversy

The stock of respondent Missouri Pacific Railroad Company ("MoPac"), an interstate railroad organized in Missouri, consists of two classes, A and B. By the terms of MoPac's charter, each share of either class is entitled

* The federal policy expressions relied on by the Court of Appeals in the present case included (1) its own interpretation of §5(11) of the Interstate Commerce Act, (2) the "National Transportation Policy" declared by Congress in the Transportation Act of 1940, and (3) this Court's decision in Schwabacher v. United States, 334 U. S. 182 (1948).

to one vote; but the Class A shares, in the nature of preferred stock, are limited to non-cumulative dividends of $5 per year and to $100 upon liquidation. The balance of MoPac's earnings and assets belongs, under the charter, to the Class B shares (R. 11-13, 96-97, 136).

As the owners of MoPac's equity, the B shares are enormously more valuable than the A shares. Each B share has an asset value approximately 50 times as large, and an earnings value approximately 70 times as large, as the corresponding per-share values of the Class A. The market prices of the two classes reflect the discrepancy in value between them (R. 6-8, 97-98).

However, the 1,849,576 outstanding A shares overwhelmingly outnumber the 39,731 B shares (R. 3, 94, 136). Respondent Mississippi River Fuel Corporation ("Mississippi") owns almost 58% of the A shares (R. 137). This constitutes almost 57% of the combined voting power of the A and B shares (R. 94). Mississippi thus has complete control of MoPac and its management (R. 5).

On December 4, 1963, MoPac's management adopted a plan to consolidate MoPac and an 83%-owned subsidiary, the Texas & Pacific Railway Company ("T&P"), into a new corporation created for the purpose of the proposed consolidation. Under the plan, the Class A and Class B shares are to be cancelled; each share of either class is to be replaced by four $25 par value common shares of the new corporation (R. 129, 138-39). The B shares are thus to be stripped of their special rights under MoPac's charter and more than $200,000,000 of the Class B's equity is to be transferred to the Class A (R. 97-98).

Petitioners, holders of a majority of the B shares (R. 94-95), contend that the B shares are entitled under MoPac's charter to vote separately as a class on the proposed plan. Respondents dispute this. Depending on the resolution of this issue, the acceptance or rejection of the plan by the stockholders is foreordained (R. 141).

The Parties

1. Petitioners were the plaintiffs below.

Petitioner Alleghany Corporation ("Alleghany"), a Maryland corporation having its principal place of business in New York, has been the beneficial owner, since 1958, of more than 20,500, or 51%, of MoPac's Class B shares. Petitioner Empire Trust Company, a New York corporation having its principal place of business in New York, holds the legal title to these shares as voting trustee (R. 23-24, 137).

The other petitioners (Slayton, Proskauer, Mendelsohn, Alfred L. Rose and Dorothy B. Rose), citizens of New York, own an aggregate of 260 MoPac Class B shares (R. 2, 15-16, 137).

2. Respondents were the defendants below.

Respondent MoPac is an interstate railroad corporation organized and having its principal place of business in Missouri (R. 1-2, 24-25). Its outstanding stock consists of 1,849,576 Class A and 39,731 Class B shares (R. 24, 26, 137).

Respondent Mississippi, a Delaware corporation having its principal place of business in Missouri, owns more than 1,071,895, or 57.95%, of MoPac's Class A shares (R. 1, 24, 52, 137).

The individual respondents (Bolinger, Clark, Cook, Jenks, Johnson, Kemper, Marbury and Peet), citizens of Missouri (R. 2, 24), are most of the directors of MoPac. Some are also directors and officers of Mississippi (R. 3, 24, 45-46, 137).

3. Two subsidiaries of MoPac should be here identified, although they are not parties.

T&P, incorporated by Act of Congress in 1871, is an interstate railroad corporation. MoPac owns 82.86% of its 445,464 outstanding shares (R. 25, 45, 137).

Texas & Missouri Pacific Railroad Company ("T&M") was organized in Delaware on December 3, 1963, one day before MoPac adopted its consolidation plan, with a total capitalization of $1,000 (R. 88-89). It is to be the surviving company in the proposed consolidation.

The Class A and Class B Shares of MoPac and the Reorganization of 1954-56.

MoPac's authorized capital stock consists of two classes, A and B. Each share of either class is entitled to one vote (R. 13-14), with the proviso that a separate vote of each class is required on any proposal that would affect the preferences or relative rights of either class.

MoPac's capitalization, the two classes of its stock, the rights pertaining to each, and the respective numbers of shares outstanding (detailed at pp. 3-4 above) are all the product of the fourth and final plan of reorganization of MoPac under §77 of the Bankruptcy Act, approved by the Interstate Commerce Commission on July 29, 1954, *Missouri Pac. R. R. Reorganization,* 290 I.C.C. 477.* Under the plan, the Class A stock was issued to MoPac's former preferred stockholders;** the Class B stock was issued to MoPac's former common stockholders.***

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* The plan was approved in Matter of Missouri Pac. R.R., 129 F. Supp. 392 (E.D. Mo. 1955), *aff'd,* 225 F. 2d 761 (8th Cir. 1955), *cert. denied,* 350 U. S. 959 (1956). It was confirmed in Matter of Missouri Pac. R.R., 135 F. Supp. 102 (E.D. Mo. 1955), *aff'd,* 229 F. 2d 898 (8th Cir. 1956).

** The basis was one share of $100 stated value Class A for each share of old $100 par value cumulative preferred stock and one additional Class A share for each $100 of dividends accumulated thereon (R. 95). At the time the plan was approved there were 701,901 shares of $100 par value preferred stock outstanding plus $[illegible]462,715 in accumulated dividends owing thereon. 290 I.C.C. at 642.

*** The basis was one share of $100 stated value Class B stock for every twenty shares of old $100 par value common stock (R. 95). At the time the plan was approved there were 813,343 shares of $100 par value common stock outstanding. 290 I.C.C. at 642.

The ICC held that this distribution of the new securities was "fair and equitable" and "would compensate them [the former preferred stockholders] fully for the rights surrendered," 290 I.C.C. at 597. See also *Missouri Pac. R. R.* v. *United States*, 337 F. 2d 637, 639 (Ct. Cl. 1964). More particularly, the ICC held that, since the preferred stockholders were receiving compensation in full, a greater earnings participation than the $5 non-cumulative preferred dividend was "not necessary," and that for the same reason the liquidation rights of the Class A "should be limited to $100 per share." *Ibid.*

The ICC recognized, moreover, that the 98% voting power of the Class A (which resulted from providing for compensation in full to the former preferred stockholders) would place the rights and privileges of the Class B (the former common stockholders) at the mercy of the Class A unless some protective provision was adopted. As noted by the ICC,

> "the plan would vest the equity in a class of stock [*i.e.*, the B stock] having only 2 percent of the voting power, while control of the property will be in the hands of the other 98 percent [*i.e.*, the A stock]." 290 I.C.C. at 599.

In order to prevent any incursion by the controlling Class A stockholders upon the rights of the Class B, the ICC directed that MoPac's certificate of incorporation should

> "specifically provide that the new company shall not alter or change the rights of holders of either class of stock or authorize the issuance of additional shares of either class or of any other class or of participating or convertible preferred stock, without the consent of the holders of not less than a majority of the number of shares of common stock

of each class at the time outstanding." 290 I.C.C. at 665.

In accordance with the ICC's directive, MoPac's Articles of Association were amended to provide:

"Article VII, Section D.

"(3) The Company shall not, without the consent . . . of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3)." (R. 92, 138)

MoPac's charter thus requires separate class votes of the A shares and B shares before the Company may "alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock." Separate class votes are also prescribed before the Company may "eliminate" this provision.

The Proposed "Agreement and Plan of Consolidation" (So Far as Here Relevant): Its Effects on Class B Shares

On December 3 and 4, 1963, MoPac's directors (all elected by Class A stockholders) and the directors of its

83%-owned subsidiary, T&P, voted to consolidate MoPac and T&P into T&M, a wholly-owned paper subsidiary of MoPac created for the purpose of the proposed consolidation. The consolidated company would have a single class of $25 par value common stock to be issued equally to MoPac Class A and Class B stockholders on the basis of four shares of the new T&M common for each share of MoPac Class A and for each share of MoPac Class B (R. 30-31, 138-39).

It is petitioners' position that the approval of the proposed plan requires separate class votes by the A shares and the B shares because the plan would "alter or change the preferences" and "special or relative rights" of these shares. For this reason, we briefly summarize the impact of the plan upon the preferences and special or relative rights of the two classes and show that it would be enormously profitable to the A stockholders and disastrous to the B stockholders.

Heretofore the A's have been preferred stockholders, restricted to a non-cumulative preferred dividend of $5 and to a liquidation preference of $100. Under the proposed plan, the A's would become common stockholders; and as such they would also become the unrestricted owners of 98% of all earnings and assets of MoPac (R. 98).

Heretofore the B's have been the common stockholders of MoPac; as such they own 100% of MoPac's earnings and equity, subject only to the limited dividend and liquidation preferences of the A's. Under the proposed plan, the B's would be reduced to the ownership of 2% of MoPac's earnings and equity (R. 98).

The equity attributable to the Class B stock issued to MoPac's former common stockholders was small when the reorganization plan was approved in 1954, but since then the railroad has prospered, with the result that the rela-

tive share in equity, and consequently the value, of the Class B has grown enormously. As of September 30, 1963 (the end of the last quarter preceding the action of MoPac's board), the equity of the Class B stock was $5,280 per share (or a total of $209,763,642) as compared with the Class A's limited preference participation of $100 per share (or a total of $184,957,600)* (R. 31, 97).

The plan concocted by the Class A-elected management would transfer $201,846,048 of the Class B's aforesaid equity to the Class A stockholders and thus shrink the Class B's equity from $209,763,642, or $5,280 per share, to $7,917,594, or $199 per share. It would hand over to the Class A stockholders an unrestricted 98% participation in equity, would eliminate the full participation in residual equity which the Commission granted to the Class B stock and leave the Class B's equity participation permanently frozen at 2% (R. 31-32, 53, 97-98).

A similar effect is produced upon the Class B's interest in MoPac's earnings. In 1962, for example, those earnings, applicable to the A and B stocks, amounted to $22.2 million (R. 6). The Class A's maximum interest in these earnings was $5 per share, or about $9,200,000 (R. 6); the balance of approximately $13 million belonged to the Class B. If the proposed plan were consummated, the interest of the Class B in these earnings would be reduced from 58% to 2%, or from $13 million to $440,000. In short, the Class A stockholders propose to appropriate about $12,560,000 of annual earnings belonging to the Class B stockholders.

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* MoPac's Annual Report for the year 1965 shows that as of December 31, 1965, the Class B's share of MoPac's residual net worth (after satisfaction in full of the Class A's preferential rights on liquidation) had increased to $245,362,000, or $6,234 per Class B share.

The legal and financial impact of these changes is obviously overwhelming.

In January 1964, MoPac and its two subsidiaries applied to the Interstate Commerce Commission for an order authorizing the proposed consolidation and the issuance of T&M's new securities.* Notwithstanding the protective class-voting provisions of its charter, MoPac stated in the application and on other occasions that the plan would be submitted to its A and B stockholders for their vote in the aggregate and not by classes (R. 5, 33). Since the 1,849,576 outstanding A shares vastly outnumber the 39,731 outstanding B shares, MoPac's method would obviously assure stockholder approval of the plan.

The Present Litigation

The filing of the three complaints herein followed the announcement by MoPac that the plan would be submitted to an aggregate vote of all shareholders in disregard of class voting (R. 5, 33, 53).

The complaints (the Alleghany and Slayton complaints are joined in this brief; the Levin complaint is separately briefed in No. 352) were filed in the District Court by Class B stockholders of MoPac against MoPac, Mississippi and the individual directors (R. 1-16, 23-37, 44-66). The Alleghany and Slayton complaints, so far as is here material, seek, among other relief, judgments declaring that MoPac's Class B stockholders are entitled to vote separately as a class and apart from the Class A stockholders on the approval of the plan (R. 10, 36).

Respondents moved to dismiss the complaints insofar as they sought this declaratory relief, on the ground that the complaints on their face showed that holders of Class

* The application was filed under §§5(a) and 20a of the Interstate Commerce Act, 49 U.S.C.A. §§5(a) and 20a.

B shares were not entitled to vote separately on the plan (R. 17-18, 21, 38-39, 40).

The parties agreed to a limited consolidation of the cases for hearing on the motions (R. 71-72) and further agreed that the court should first decide the voting rights question, because if the right of the Class B stockholders to vote as a class were sustained it was recognized that the majority of the B shares would be voted in the negative and that would be the end of the plan (R. 77-79).

The District Court denied the motions to dismiss the complaints, finding that under the charter and applicable Missouri law the assent of separate majorities of each of MoPac's two classes of stock was required for approval of the proposed plan in accordance with §5(11) of the Interstate Commerce Act (R. 90-100).

The Court of Appeals entertained defendants' appeal from the District Court's order upon certification by the latter under 28 U.S.C. §1292(b) that it presented a controlling question of law the immediate review of which might materially advance the ultimate determination of the litigation (R. 102-04).

The Court of Appeals entered judgment reversing the judgment of the District Court, and petitioners now seek review and reversal of the judgment of the Court of Appeals.

Summary of Argument

Section 5(11) of the Interstate Commerce Act requires as one of the essential conditions to approval of a voluntary railroad merger by the Interstate Commerce Commission that there be the assent of a majority of the shares entitled to vote "unless a different vote is required under applicable State law." The provisions of the

MoPac charter require approval of the proposed plan by separate majorities of the Class A and of the Class B shares outstanding. This charter requirement is expressly made controlling by the applicable Missouri statute, §351.270 of the General and Business Corporations Law.

In denying a class vote to petitioners, holders of a majority of the Class B shares, the Court of Appeals committed three errors that require reversal of the judgment below:

First, it misconstrued §5(11) by treating the federal rule of a majority vote as being the "primary standard" and the "different vote" under State law as an "exception" to that general rule. It then imposed a burden of persuasion upon petitioners to show that they fell within the "exception," found itself in doubt as to the meaning of State law, declared that petitioners had failed to meet the novel burden of persuasion and resolved its doubts in favor of what it called the "primary standard," of the federal majority rule and against the class vote of the "exception."

Second, it further misconstrued §5(11) by disregarding the clear mandate of §5(11) to give effect to applicable State law. Instead, it invoked the "National Transportation Policy" and the exclusive and preemptive character of §5(11), though the former is silent as to voting rights and the latter is explicit in giving effect to State law, to smother and give no effect to State-created voting rights.

Third, it laid misplaced emphasis upon the word "required" in §5(11) by treating a class vote as not being "required" under State law, even though the State statute directs that a charter provision for a class vote shall have controlling effect. The conclusion reached by the

Court of Appeals is contrary to the consistent practice of the ICC in giving effect to class and other voting requirements of railroad charters and State statutes. This practice, though called to the attention of the Court of Appeals, was disregarded by it.

The Court of Appeals suggested in its opinion that if it was in error, petitioners might press their arguments for relief before the ICC at hearings on the plan. The fact that petitioners may appeal to the discretion of the ICC concerning the fairness of the terms of the proposed consolidation affords no ground for depriving petitioners of the remedy they now seek as a matter of right under the law with respect to their voting rights.

The ultimate issue in this litigation is whether the Class B shareholders are entitled to vote separately as a class on the proposed consolidation and this, in turn, under §5(11), depends upon the applicable Missouri law. The District Court decided that the right to a class vote was found in the charter provisions and that these were effective under Missouri statute law.

The charter provisions of MoPac require a class vote on any proposal that would "alter" the "preferences . . . and special or relative rights" of the Class A or Class B stock. The District Court found that the proposed plan "plainly and obviously" altered and changed the preferences and relative rights of the two classes and that this is shown by the drastic features and effects of the proposed plan. The class vote provisions of MoPac's charter are a fundamental requirement incorporated at the direction of the ICC in the reorganization plan of MoPac that was approved and confirmed by the courts in 1955 and 1956. It was the purpose of the ICC in requiring provisions for class voting in MoPac's charter to provide protection against precisely the kind of appropriation now being attempted by the Class A majority. The decision of the

Court of Appeals would frustrate the integrity of this plan.

We urge this Court to correct the errors of the Court of Appeals in treating the questions before it as questions exclusively of federal law and to accept the decision of the District Court on State law as a permissible one and one that was not overturned by the Court of Appeals as being an erroneous decision on State law. We, therefore, ask that the judgment of the District Court be affirmed on remand.

ARGUMENT

I.

The Rejection of class voting by the Court of Appeals rests on its misconstruction of Section 5(11) of the Interstate Commerce Act and on its failure to give the applicable Missouri State Law the due effect required by Section 5(11).

A. State Law Is Recognized Under Section 5(11) and Governs the Stockholder Vote in the Present Case.

There is no question that, in general, the Commission, pursuant to the provisions of §5 of the Interstate Commerce Act, possesses exclusive and plenary jurisdiction over consolidations and mergers of railroads subject to the Act. On one important subject, however, §5 itself specifically provides that that exclusive and plenary jurisdiction must defer to, recognize and give effect to "applicable" State law; that is, the subject of the stockholder vote required to accomplish a consolidation or merger. Section 5(11) authorizes carriers to consummate

mergers pursuant to ICC authorization, but only "with the assent . . . of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote. . . ."

Section 5(11) thus recognizes State-created rights in a situation in which Federal law is otherwise supreme. The exclusive and plenary powers vested in the Commission give to it power to proceed, in all instances under its jurisdiction, regardless of approval of State authorities. But Federal law is thus supreme only if all of the conditions and considerations set forth in the Act are met.

This Court reviewed the essential conditions, including the deference to State law with respect to the necessary stockholder vote, in *Schwabacher* v. *United States*, 334 U. S. 182 (1948), and stated:

> "So reading the legislation relevant to this merger, we find that approval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it 'will be consistent with the public interest.' (§5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is 'just and reasonable.' (§5(2)(b).) Third, assent of a 'majority unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote.' (§5(11).) When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority. . . ." *Id.* at 194.

Since the consolidation involved in the *Schwabacher* decision had received the "approval of considerably more

than the number of shares made necessary by statutes of the respective states," 334 U. S. at 184, no issue was involved on this subject.

The controversy in the *Schwabacher* case concerned solely the rights of dissenting stockholders holding less than 2% of the cumulative preferred stock of one of the railroads. These stockholders claimed a right under Michigan law to the full payment of par value plus accrued dividends. The Commission disclaimed jurisdiction over this issue. Congress had been silent on the point at issue and had not specifically provided for recognition of the State-created rights there asserted. This Court, after a full review of transportation legislation, held that State law was inapplicable and that the Commission had the jurisdiction and consequently the duty to decide the valuation issue as a part of its duty to determine whether a plan was just and reasonable.

Here there is no Congressional silence. Here Congress has specifically stated the effect to be accorded to State law in §5(11). It has determined to recognize and give effect to State law whenever State law requires a different vote than the majority vote that Congress provided solely in the event of the absence of any applicable State standard.

We show under II, below, that a class vote is required under Missouri law. It follows that such a vote must be recognized under §5(11). Missouri has legislated on this subject. The applicable Missouri statute, §351.270 of the General and Business Corporations Law, is explicit in giving controlling effect to MoPac's charter provisions. We show below, too, that the charter provisions require a class vote on the present plan.

B. The Errors of the Court of Appeals in Its Application of the "National Transportation Policy" and in its Construction of Section 5(11) Require Reversal of the Judgment Below.

In rejecting the requirement of a class vote on MoPac's consolidation, the Court of Appeals erred in three respects in its interpretation of §5(11). The Court compounded these errors by confining its decision to the interpretation of §5(11) and side-stepping the decision of the District Court, which had reached a permissible conclusion as to State law.

First, the court treated the recognition of "a different vote" under State law as being an "exception" to what it characterized as the "primary standard" of the federal rule of a majority vote in §5(11) (R. 148). Having thus substituted its own dichotomy of rule and exception for the Congressional language of §5(11), the court proceeded to place the burden on petitioners to show that the present case fell within the "exception." The court held that petitioners had not done so (R. 157).

Second, after expressing doubts as to the meaning of MoPac's charter and Missouri State law (R. 150, 155), the court proceeded to put aside State law and give effect instead to a federal "National Transportation Policy" (R. 142-46, 157) that is silent on the subject of State-created voting rights and to interpret §5(11) so as to destroy its explicit recognition of State-created voting rights.

Third, the court erred in holding that class voting is "merely permitted" rather than "required" under Missouri law (R. 155-57). It ignored the uniform construction of §5(11) by the Interstate Commerce Commission, the agency primarily charged with its enforcement, which has

consistently applied §5(11) to give effect to the voting requirements of applicable corporate charter provisions authorized under the law of the State of incorporation of the railroad, including requirements of a class vote.

As a direct result of the foregoing errors, the court further erred in failing to give effect to the long-standing rule of the Eighth Circuit that a permissible conclusion of a district court judge on a doubtful question of the law of his state will be accepted and will not be reversed. Instead, the court treated the question before it as one of the construction of a federal statute, §5(11), and not of Missouri State law.

1. On the first point, we submit that the language of §5(11) is clear: If applicable State law requires a different vote from the majority vote provided by §5(11), then the State law governs and the number so required "shall assent" before the plan can be adopted.

Section 5(11) provides that a prerequisite to effectuation of a merger or consolidation of a carrier, is

> "the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, *unless a different vote is required under applicable State law, in which case the number so required shall assent,* of the votes of the holders of the shares entitled to vote. . . ." (Emphasis added.)

The Court of Appeals, however, stood §5(11) on its head and erroneously concluded that

> "it is evident that the primary standard of application is a vote of the majority of all the voting shares. The statute speaks, in the first instance, 'of a majority . . . of the votes of the holders of the shares entitled to vote'. Departure from this

standard is, then, the exception and not the rule." (R. 148)

We submit that, if there is any point at all in referring to "primary standards" and "exceptions," it is State law that is accorded a "primary" position in §5(11) that it would not otherwise have. The federal majority rule exists, we submit, to fill gaps that would exist if there were no "applicable" State law.*

The Court of Appeals, instead of deciding the questions of State law, gave effect to its supposed dichotomy of rule and exception by placing a novel burden on petitioners. It asserted that petitioners must surmount enumerated "hurdles" of State law in order to fall within the exception and that petitioners had failed in this exercise of persuasion. It concluded that any doubt concerning the meaning of State law be resolved in favor of what it deemed the "rule" and against the "exception" (R. 157). The court thus erroneously substituted a burden of persuasion for a decision on State law.

2. On the second point, the Court of Appeals examined both MoPac's articles and Missouri law; as to the former it found that the "opposing points of view as to MoPac's Articles are not easily resolved" (R. 148-50) and failed to resolve them (R. 157); and as to the latter it found only that Missouri law provided "no clearcut, free-from-doubt and positive answer" (R. 155) and went no further (R. 157). Instead, the Court of Appeals resolved its

* The rarity of the lack of a State standard today is attested by the ICC's Rule 52.3, 49 C.F.R. 52.3, which requires applicants for merger or consolidation to file proof of compliance with corporate charter and state statutory provisions as to stockholder approval. This Rule does not even mention the provisional majority vote standard of §5(11).

doubts by relying on "the significance of the national transportation policy and its emphasis on railroad consolidation" (R. 157) (though that policy is silent as to voting rights) and on "the stated exclusive and plenary character of §5(11), and with its consequent preemptive nature" (R. 157) (though that section is specific in deferring to State law on the subject of voting rights).

In reliance on these two erroneous applications of federal law, the Court of Appeals then proceeded to resolve its doubt as to State law "on the side of those provisions of the statute which bespeak the rule and not on the side of those which provide the exceptions" (R. 157). Here again, as under the first error discussed above, the invented dichotomy of rule and exception was applied and led to a necessarily incorrect result. State law, to which §5(11) defers specifically, was put aside in the name of the "National Transportation Policy" stated by Congress; yet that policy, unlike §5(11), is silent as to voting rights and silent as to any situation in which State law is to be applied. The Court of Appeals smothered State law under this broad cloak of policy; and at the same time it smothered the clear mandate of §5(11) to apply that State law, in the name of the policy statement enacted in support of the section.

The Court's total failure to resolve the State law issue is strikingly emphasized by the closing paragraph of its opinion (R. 158). The District Court had resolved the State law issues in favor of petitioners. Since the Eighth Circuit considered the State law questions as doubtful, it should have followed its own firmly settled practice of adopting the District Court's interpretation of the State law.* In this case, however, the Eighth Circuit refused

* *Homolla* v. *Gluck*, 248 F. 2d 731, 733-34 (8th Cir. 1957), and other cases cited below, pp. 27-28.

to follow the District Court. Its refusal was not based on a finding that the District Court had misconstrued Mopac's charter or the Missouri statutes. The Court held, instead, that "the question here . . . is a matter which primarily concerns the interpretation of §5(11)" (R. 158). Plainly, the Court of Appeals deliberately refrained from holding that Missouri law does not require a class vote in this case. It simply held that, State law being doubtful, §5(11) and the "National Transportation Policy" compel a decision against class voting.

In summary, the Court of Appeals first found itself in "doubt," side-stepped a decision as to applicable State law, refrained from overturning the decision of the District Court on State law and then proceeded to take State law out of §5(11) and give to it no effect whatsoever. And this was done in the name of wholly erroneous applications of federal law.

3. The third error of the Court of Appeals lies in its conclusion that class voting is "merely permitted" rather than "required" by Missouri law (R. 155-57). The court so thought because it is not "mandatory" that a corporate charter prescribe class voting.

The Court apparently believed that class voting is "required," within the meaning of §5(11), only if State law, by statute, calls for class voting on each and every corporate merger or consolidation. Section 5(11), however, does not so provide. It looks to the votes required by State law with respect to the particular merger or consolidation before the court. If in the particular case a State-authorized charter provides for class voting, then the stockholders have the right to a class vote and it is, consequently, "required by applicable State law."

In rejecting this conclusion, the Court of Appeals disregarded the consistent practice of the ICC, the agency charged with giving effect to §5(11) since its enactment in 1940. That agency has consistently applied the section to give effect to voting requirements, including class-voting requirements, of railroad charters and State statutes.

Indeed, so consistent has been the ICC's enforcement of railroad charter and state statute class-vote requirements in merger applications under §5(11), that railroads regularly comply with such requirements. Thus, the ICC's records show compliance with class-vote requirements in the following recent railway merger applications:

Seaboard Air Line-Atlantic Coast Line Merger, I.C.C. F.D. No. 21215 (approved Dec. 2, 1963), application p. 18;

Norfolk & W.—The Virginian Merger, I.C.C. F. D. No. 20599, 307 I.C.C. 401, 415 (Div. 4, 1959);

Norfolk & W.-New York, Chi. & St. L. Merger, I.C.C. F.D. No. 21510 (*pen'g*), application p. 20;

Erie-Delaware, L. & W. Merger, I.C.C. F.D. No. 20707 (approved Sept. 13, 1960), report of hearing examiner (Sept. 26, 1963);

C.&O.-Pere Marquette Merger, I.C.C. F.D. No. 15228;

Chicago & N.W.-Chicago, Great W. Merger, I.C.C. F.D. No. 23388 *(pen'g)*;

Chicago & N.W.-Chicago, Milwaukee & St. P., I.C.C. F.D. No. 24182 *(pen'g)*, Ex. B-1 to joint merger application.

In *Norfolk & W. Ry. Merger, supra,* the Commission held:

> "Under Virginia law, which is controlling on this point, approval of the plan of merger requires the affirmative vote of the holders of more than two-thirds of the outstanding capital stock of each company, including at least a majority of each class of stock of each company." 307 I.C.C. at 415.

And in two more recent proceedings, the ICC has held that class votes were required for approval of mergers where the railroads' charters so required, although there was no class-vote requirement in the applicable state statutes themselves. See the report of the hearing examiner, pp. 128-29, filed January 19, 1961 in *Missouri Pac. Control of Chi. & E. Ill. R.R.,* I.C.C. F.D. No. 21755, and compare with Indiana Laws, §§25-230, 25-216 (1960), and §55-2409 (1951). And compare the decision in *Chicago & N. W. Ry.,* 328 I.C.C. 126, 133 (finding that the Rock Island required class-vote approval) with the charter of that railroad (on file with the New York Stock Exchange), which requires class-vote approval of a merger, and with the applicable state statutes (tit. 26, §§313-314, 513-514, tit. 8 §§251, 162(b)(4) (1953) of the Delaware laws), none of which requires a class vote by its terms.

See also ICC Rule 52.3 (C.F.R. §52.3), promulgated the same year that §5(11) was enacted.*

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* Under this Rule, all applicants for merger or consolidation are required to file as exhibits their corporate charters and by-laws (52.3(a)(1)(i)), and

> "if the charter or by-laws of the applicant or carrier require approval of the stockholders, a copy of the resolutions of stockholders authorizing the proposed transaction and the making of the application;" (52.3(b)(1))

They are also required to file an opinion of counsel as to the legality of the proposed transaction "with specific reference to any specially pertinent provisions of applicant's, or applicant's and carrier's charter or articles of incorporation." (52.3(b)(5))

This uniform construction of §5(11) was called to the attention of the Court of Appeals, which, however, gave no consideration to the ICC's interpretation in its opinion below.

We submit that the three errors discussed above require reversal of the judgment below.

C. Petitioners' Right to Challenge the Plan Before the ICC Furnishes No Ground for Rejecting Petitioners' Present Claim at Law for Recognition of Their Class Voting Rights.

Near the close of its opinion, the Court of Appeals stated that if it had erred there was "comfort" in the point that petitioners might press their arguments for relief before the Interstate Commerce Commission at hearings on the plan (R. 157-58).

The issues before the ICC at such hearings will be, of course, whether the plan is consistent with the public interest and is just and reasonable, §5(2)(b). The decision on these issues is to be made by the agency of government charged with carrying out the statutory provisions, subject to judicial review in the courts. The plea that petitioners may make before the ICC is necessarily a plea to the discretion of the Commission.

The issues in this litigation, on the other hand, are whether the class-voting provisions of MoPac's charter, which were originally included at the instance of the ICC for the very protective purpose for which they are now invoked, are to be recognized and given effect so that these shareholders, voting by classes, may exercise their independent discretion as to whether they will assent to the plan.

We submit that petitioners have these two remedies, *i.e.*, before the courts and before the Commission. How-

ever, the fact that petitioners would in any event have the legal right to appeal to the discretion of the Commission furnishes no reason for depriving them of the special class-voting safeguard that the Commission directed be written into the MoPac charter for the very purpose for which it is now invoked, namely to enable this minority group to protect itself from expropriation and virtual destruction.

The questions that are presented in these judicial proceedings are questions of law. These questions are wholly different from the appeals to discretion that may be presented to the ICC.

II.

The class vote issue is now ripe for a determination by this Court.

The ultimate issue in this litigation is whether MoPac's Class B shareholders are entitled to vote separately as a class upon the proposed consolidation. Section 5(11) refers this issue of the required vote to the applicable State law of Missouri. Under that law, the right to a class vote must first be found in the charter provisions of MoPac, a Missouri corporation, and then these charter provisions must be found to be valid and effective under Missouri law. The District Court decided both points in favor of petitioners.

A. We Ask This Court to Reverse the Judgment of the Court of Appeals with Directions that the Order of the District Court be Affirmed on Remand.

In urging reversal on the grounds stated under I.B. above, we ask that this Court correct the basic error of the Court of Appeals in treating the question before it as

one exclusively of federal law. We do not, however, ask this Court to take on the added burden of examining the charter provisions and Missouri State law and of rendering a decision on the questions of State law presented on this record. Instead, we believe it to be appropriate to ask this Court to reverse the judgment below with directions that the order of the District Court be affirmed.

We urge this because the District Court, unlike the Court of Appeals, reached a decision on the applicable State law which is at least a permissible one, since the Court of Appeals itself considered the State law questions as doubtful (R. 150, 155) and recognized that "there are significant contrary arguments" in favor of class voting (R. 157). We urge this further under B below. We also urge that the Court of Appeals did not overturn the decision of the District Court as an erroneous decision on State law, as we also urge under B below, but instead, reached its own decision on erroneous and inapplicable federal grounds. Since the Court of Appeals "has not disagreed" with the State law holdings of the District Court, it is appropriate that this Court "leave undisturbed the interpretation placed upon purely local law by a [Missouri] federal judge"* and reinstate his decision. *Steele* v. *General Mills*, 329 U. S. 433, 439 (1947).

We urged before the Court of Appeals that the District Court's decision was a permissible one upon a doubtful question of State law and should be accepted under that court's own well-established rule that district court findings as to doubtful questions of State law will be upset only

* None of the members of the panel of the Court of Appeals that decided this case was a member of the Bar of Missouri. The District judge had been a member of the Bar of Missouri and engaged in practice in that State for some twenty-five years before his appointment to the bench.

in cases of clear error. *E.g., Doering* v. *Buechler,* 146 F. 2d 784 (8th Cir. 1945); *Traders & Gen'l Ins. Co.* v. *Powell,* 177 F. 2d 660, 668 (8th Cir. 1949); *Nolley* v. *Chicago, M., St. P. & P.R. Co.,* 183 F. 2d 566, 572 (8th Cir. 1950), *cert. denied,* 340 U. S. 913 (1951); *Northern Liquid Gas Co.* v. *Hildreth,* 180 F. 2d 330, 336 (8th Cir. 1950); *Pendergrass* v. *New York Life Ins. Co.,* 181 F. 2d 136, 141 (8th Cir. 1950); *Homolla* v. *Gluck,* 248 F. 2d 731, 733-34 (8th Cir. 1957); *Campbell* v. *Village of Silver Bay,* 315 F. 2d 568 (8th Cir. 1963).

The Court of Appeals, however, declined to accept the District Court's decision on the ground that:

> "The question here, however, is a matter which primarily concerns the interpretation of §5(11). This is a federal statute. Despite its interplay with the Missouri law, our difference with the district court relates to this statute and the national transportation policy." (R. 158)

The Court of Appeals added:

> "As a consequence, our perhaps too frequent pronouncements about our unwillingness to override a permissible conclusion reached by an experienced trial judge as to a doubtful question of the law of his state, see *Homolla* v. *Gluck,* 248 F. 2d 731, 733-34 (8th Cir. 1957), has [sic] no persuasive application here." (R. 158)

We submit that this reasoning stems from the basic errors of federal law of the Court of Appeals, discussed under I, above.

B. The District Court Reached a Permissible Conclusion as to Missouri State Law and the Court of Appeals did not Overturn It.

The District Court stated the crux of the issue to be "whether or not the plan of consolidation as approved by MoPac must be concurred in by separate majorities of Class A and Class B shareholders of MoPac" (R. 92).

The District Court proceeded to make a detailed examination of the Articles of Association of MoPac. It found that the proposed plan to consolidate was company action under Article VII(D)(3) (R. 93). It held that a class vote was required if company action of any type or by any method, whether by consolidation or merger or otherwise, brought about a change in the preferences or relative rights of the Class A or Class B stock (R. 93). It further found that the proposed plan "plainly and obviously" altered and changed the relative rights and preferences of the two classes of stock (R. 97), noting that the plan would destroy the Class B stockholders' constantly increasing share in the total equity and freeze its relative equity participation in the enterprise at 2%, that it would reduce the equity of the Class B stockholders from $209,763,642 to $7,917,594 as of September 30, 1963, and that it would increase the equity of the Class A stockholders from $184,957,600 to $368,523,721.

The District Court also found that §351.270 of the Missouri statutes was the applicable State law and that, under that section, "the voting requirements for adoption of the proposed plan are controlled by the Articles of Association of Missouri Pacific Railroad Company" (R. 94).

The opinion of the District Court also concluded that since the proposed plan would obliterate MoPac itself and thus the protective provisions as to class voting found in

Article VII(D)(3), such action was alone sufficient ground for requiring a class vote under that Article (R. 98).

The Court of Appeals did not overturn this conclusion on State law.

We have already noted above, pp. 18, 20-22 that the Court of Appeals sidestepped a decision on the State law questions. In doing this, the Court of Appeals recited at length the arguments pro and con as to the proper interpretation of MoPac's Articles (R. 148-50) and merely concluded that "These opposing points of view . . . are not easily resolved" (R. 150). There is not a hint of a suggestion that the view taken by the District Court was in error. When the Court of Appeals turned to Missouri statutory law it again recited the opposing points and arguments at length (R. 150-55) and found "no clearcut, free-from-doubt and positive answer . . . to the issue of class voting under Missouri law" (R. 155). Again, there is not a hint that the view taken by the District Court was in error.

We conclude that the Court of Appeals did not even suggest that the view taken of the State law by the District Court was in error or that it was not a permissible view. On the contrary, the Court of Appeals did no more than express its difficulties and doubts as to these questions.

C. The MoPac Articles of Association as Approved by the Interstate Commerce Commission, by the District Court for the Eastern District of Missouri, and by the Court of Appeals for the Eighth Circuit, Were Designed to Require Class Voting for Approval of a Plan Such as the Proposed Plan of Consolidation.

The District Court dwelt on the provisions of MoPac's Articles at length (R. 92-98), and its decision on this point is not only permissible but entirely persuasive.

These Articles, after establishing the preferences and relative rights of the Class A and Class B stock, provide that such preferences and relative rights shall not be altered or changed without the separate consent of at least a majority of each class. Article VII(D)(3) states:

> "The Company shall not, without the consent . . . of the holders of record of at least a majority of the number of shares of the Class A stock then outstanding and at least a majority of the number of shares of the Class B stock then outstanding . . . (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A stock or of the Class B stock or (d) amend or eliminate any of the provisions of this paragraph (3)." (R. 13)

The District Court tested the proposed plan against the above language of MoPac's Articles and against the relative rights and positions of the two classes of stock and concluded that the plan:

> "seems so plainly and obviously to alter and change the preferences, qualifications, limitations, restrictions and special and relative rights of the Class A and the Class B shares as not to require discussion. It matters not to whose advantage the plan accrues nor whether the plan be fair or unfair. The question is whether the two classes' relative rights, restrictions and limitations are to be altered and changed. It is patent that alteration and change of relative rights, preferences and limitations and restrictions in respect to dividends and upon dissolution are inherent in the plan for the exchange of the two classes of stock for identical common stock in the proposed new company." (R. 97)

The decision of the District Court is fully supported by the language of Article VII(D)(3), which broadly prohibits, unless sanctioned by class vote, alterations or changes in the "preferences" and "relative rights" of the two classes of stock without reference to how the alterations or changes are to be accomplished. It focuses on the result, not the method. It is all-inclusive in its application.

The alterations and changes are sweeping. The A shares are no longer to be limited to a $5 non-cumulative dividend and to $100 upon liquidation, and their holders are to become common stockholders. As such, these former preferred stockholders would become unrestricted owners of 98% of all earnings and equity of MoPac. The added equity value attributable to the new shares is substantially in excess of $200,000,000. The B shareholders, who are the common stockholders of MoPac with full ownership of MoPac's earnings and assets subject only to the dividend and liquidation preferences of the A shares, are to be reduced to a permanent 2% interest in MoPac. They will have lost their interest in the $200,000,000 that is the gain of the A shares.

It is hard to conceive of a more radical alteration or change of the relative rights of the two classes.

The provisions of Article VII(D)(3) were designed by the Interstate Commerce Commission to protect against precisely the kind of appropriation now being attempted by the Class A majority.

The various reorganization plans of MoPac resulted in the final plan which, unlike earlier plans, recognized the existence of an equity in the common stock and allocated to it the new Class B shares, representing the residual

equity in the earnings and equity of the reorganized company. 290 I.C.C. at 665.*

The former preferred shareholders received the new A shares. Their claim upon the earnings and equity of the reorganized company was subjected to specific maximums, *i.e.*, a maximum non-cumulative dividend of $5 per share and a liquidation preference of $100. Furthermore, their claim on earnings, though prior, was not a fixed claim, but would depend each year upon the action of the board of directors.

The Class B stockholders, as the Commission emphasized, "will be entitled under the agreed plan to all residual earnings after payment of dividends on the new Class A stock." 290 I.C.C. at 600.

The result was, as the ICC stated:

> "that the plan would vest the equity in a class of stock [*i.e.*, the B stock] having only 2 percent of the voting power, while control of the property will be in the hands of the other 98 percent [*i.e.*, the A stock]." 290 I.C.C. at 599.

In short, the equity in the enterprise was vested in the Class B stock, but the voting control was vested in the A stock. The result of this situation, in turn, was that the A stockholders, with voting control, might readily later take for themselves more than they were receiving under the reorganization plan to the detriment of the B stockholders. Any such change would be contrary to the purpose of the reorganization plan, since the Class A shares, with all their limitations and restrictions, were designed to give the former preferred stockholders of MoPac full

* The basis for that allocation was the Commission's finding that "the improved possibility of earnings for the new Class B stock justifies immediate participation in the plan by the old common-stockholders." 290 I.C.C. at 600.

compensation for the rights surrendered by them. 290 I.C.C. at 597; *supra*, p. 7.

In order to preclude any such possibility, there was built into the plan from the outset the requirement that the B shares receive protection through class voting. The Commission directed (290 I.C.C. at 665; *supra*, pp. 7-8) that the certificate of incorporation of the new company must provide class-vote protection for the Class B stockholders against any changes in any of their relative rights, preferences, etc., in the manner specified in Article VII(D)(3). The final plan of reorganization, as thus constituted, was approved by the District Court in 1955 as fair and equitable and as affording due recognition to the rights of each class of stockholders, and its decision was affirmed by the Court of Appeals in 1956.*

The right of the Class B shareholders to cast a separate vote on any proposal to "alter or change the preferences" and "relative rights" of these shares is an essential and integral part of MoPac's reorganization. It must be presumed that the District Court and the Court of Appeals in approving and confirming the plan of reorganization in 1955 and 1956 approved and confirmed a plan that was in conformity with and valid under Missouri law insofar as MoPac's Missouri charter was concerned.

The Court of Appeals now holds that respondents may defeat the reorganization plan and evade the requirement of a class vote by the simple device of consolidating MoPac with two of its subsidiaries. Such an erosive interpretation of the reorganization plan, and of the charter that is the product of it, would place the rights of the B shareholders at the mercy of the A shareholders as effectively as if class voting had never been provided for.

The decision of the Court of Appeals would thus frustrate the integrity of the reorganization plan.

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* See the first footnote on p. 6, *supra*.

D. Applicable State Statutory Law Is Found in Chapter 351 of the Missouri General and Business Corporations Law.

Both the District Court and the Court of Appeals were in agreement that Chapter 351 of the Missouri Statutes, the General and Business Corporations Law, applies here (R. 94, 153-55).

The merger provisions of Missouri law are found in §351.425 of that chapter. This section requires approval by a two-thirds majority of the outstanding shares, without regard to class voting, on plans for merger or consolidation:

> "351.425. Voting by shareholders on plan for merger or consolidation
>
> "At each such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations."

However, this Section must be read in conjunction with §351.270 of the same chapter. Section 351.270 makes the class-voting requirements of MoPac's charter controlling under the State's law by incorporating into, adding to and superimposing upon other sections of Chapter 351 such extra requirements for stockholder approval as may be contained in a corporate charter:

> "351.270. Vote of concurrence of shareholders shall be controlled by articles of incorporation, when
>
> "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the

> holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section."

The effect of §351.270 is to give to stockholders a statutory right to secure for themselves a greater protection than is otherwise afforded by statute. Accordingly, it adds the class-voting requirements of the MoPac Articles to the overall two-thirds vote in the merger provisions of §351.425. It follows that there must be an affirmative vote of a majority of each class as well as an affirmative vote of two-thirds of all outstanding shares.

The statutory language of §351.270 shows a purpose to enforce charter requirements in two situations: (1) when they specify a greater vote than is required by the statute; and (2) when, as here, they specify a class or series vote that is not required by the statute. In short, the objective is to provide general statutory sanction for charter provisions creating additional stockholder safeguards over and above the statutory prescription.

The relationship between the two sections seems straightforward. Section 351.270 is explicit in making charter requirements paramount—"the articles of incorporation shall control this section."

The District Court recognized this relationship when it cited §351.270 to support the statement that "the voting requirements for adoption of the proposed plan are controlled by the Articles of Association. . . ." (R. 94).

The sanction of the class-voting provisions of the charter by this statute was necessarily comprehended in the decisions of the District Court and the Court of Appeals in 1955 and 1956 when they approved and confirmed the plan of reorganization which specified the protective provisions of Article VII(D)(3) of the MoPac charter.

Conclusion

For all of the reasons stated above, we conclude that:

1. The Court of Appeals erred in not giving effect to the charter provisions of MoPac and to the statutory law of Missouri, as required under §5(11) of the Interstate Commerce Act, and in thereby failing to sustain the right of petitioners to vote as a class on the proposed consolidation.

2. The District Court reached a reasonable and permissible decision on the questions of State law that required decision under §5(11), and its decision on the State law was not overturned by the Court of Appeals.

3. It is appropriate for, and we ask, this Court to reverse the judgment of the Court of Appeals and to affirm the order of the District Court.

Respectfully submitted,

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November 22, 1966

APPENDIX A

Section 5(11) of the Interstate Commerce Act, 54 Stat. 898, 908-09 (1940), 49 U.S.C.A. §5(11) (1959):

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or

indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. .

Statement entitled "National Transportation Policy," 54 Stat. 898, 899, 49 U.S.C.A. preceding §1 (1959):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Missouri General and Business Corporations Law, R.S. Mo. (1959), 17A Mo. Stats. Anno. §351 (Vernon's 1966):

351.270. Vote of concurrence of shareholders shall be controlled by articles of incorporation, when

Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this Section. (L. 1943 p. 410 §168)

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351.420. Plan of merger or plan of consolidation shall be submitted to vote at meeting of stockholders

The board of directors of each corporation, upon approving such plan of merger or plan of consolidation, shall, by resolution, direct that the plan be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting. Notice of such meeting shall be given as provided in section 351.230. Such notice, whether the meeting be an annual or special meeting, shall state the place, day, hour, and purpose of the meeting, and a copy or a summary of the plan of merger or plan of consolidation, as the case may be, shall be included in or enclosed with such notice. (L. 1943 p. 410 §64)

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351.425. Voting by shareholders on plan for merger or consolidation

At each such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the out-

standing shares entitled to vote at such meeting, of each of such corporations. (L. 1943 p. 410 §65)

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351.690. Applicability of this chapter to existing corporations.

The provisions of this chapter shall be applicable to existing corporations as follows:

(1) Those provisions of this law requiring report, registration statements, antitrust affidavits, and the payment of taxes and fees, shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign, which were required to make such reports, registration statements and antitrust affidavits, and to pay such taxes and fees, prior to the enactment of this law;

(2) No provisions of this law, other than those mentioned in subdivision (1), shall be applicable to banks, trust companies, insurance companies, building and loan associations, savings bank and safe deposit companies, mortgage loan companies, and nonprofit corporations;

(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, co-operative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union

stations, street railroads, telegraph and telephone companies, and booming and rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3).

(4) All of the provisions of this law to the extent therein provided shall apply to all other corporations, existing under prior general laws of this state and not specifically mentioned in subdivisions (1), (2) and (3) of this section. (L. 1943 p. 410 §171; L. 1945 p. 696)